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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1068 and 1069

ILLINOIS NORTHERN UTILITIES COMPANY,
Petitioner,

vs.

CITY OF GENESEO, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY,
Petitioner,

vs.

VILLAGE OF HEYWORTH, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS.

DAVID F. TABER,
Attorney for Illinois Northern Utilities Company, Petitioner.

CLAUDE A. ROTH,
Attorney for Central Illinois Electric and Gas Company, Petitioner.

ISHAM, LINCOLN & BEALE,
WILSON & MCILVAINE,
DIXON, DEVINE, BRACKEN & DIXON,
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MAY IT PLEASE THE COURT:

The questions which petitioners, relying upon the rights guaranteed to them by the due process clause of the Fourteenth Amendment, ask this Court to determine are stated on page 13 of the petition, as follows:

"Are the due process primary requirements of juris-

diction and hearing violated where the Supreme Court of Illinois, vested only with power to determine, on the basis of the record before the Commission, the reasonableness or lawfulness of the Commission's order, holds that the Cities and Villages Act grants power to Geneseo and Heyworth to oust petitioners, when that issue was not made by the record before the Commission, and under the then prevailing law could not have been entertained or determined by the Commission?

"Does the judgment of the Supreme Court sought to be reviewed deprive petitioners of their property rights vested in them by their judgments in the former ouster suits? If so, did the Supreme Court have jurisdiction?"

The brief of respondents does not meet these questions. Instead it substitutes (page 2) for these questions the following:

"Assuming for argument's sake that any federal question is presented, did the Supreme Court of Illinois deny petitioners due process,

"(a) By deciding judicially, on appeal from orders of an administrative body, that Illinois Commerce Commission has administrative jurisdiction and is charged with the administrative duty, under Illinois statutes and the undisputed facts in the record, to issue the orders prayed in the complaints before it,—petitioners in the same proceedings vigorously having invoked and asserted the jurisdiction of the Commission to deny such relief?

"(b) By refusing, in arriving at that decision, to apply the principle of *res judicata* to certain of its own alleged prior decisions and certain alleged prior adjudications of its circuit courts?"

The "Questions Presented" as revised in respondents' brief omit two important factors. First, they omit to mention that at the time these complaints were heard by the Commission the then prevailing law, repeatedly announced by the Supreme Court of Illinois itself, was that the Commission had no jurisdiction to entertain or deter-

mine such purely legal questions as (1) whether the special charter of Geneseo and the Cities and Villages Act conferred power of ouster upon Geneseo and Heyworth, respectively, (2) whether the Public Utilities Act repealed that grant, and (3) what rights were adjudicated between Geneseo and Northern and between Heyworth and Central in their respective prior ouster suits.

Second, the "Questions Presented," as revised in respondents' brief, omit to mention that the Supreme Court of Illinois in reviewing an order of the Commission has only the jurisdiction conferred upon it by the Public Utilities Act to determine, on the basis of the record before the Commission, the reasonableness or lawfulness of the Commission's order.

In the specification of "Questions Presented" respondents' brief treats the power to examine judgments and determine the rights thereby adjudicated and the power to determine whether the Cities and Villages Act granted power of ouster and whether such grant was repealed by the Public Utilities Act as matters which were within the "administrative jurisdiction" and "administrative duty" of the Commission to determine and enforce by order. But respondents' brief cites no authority that the examination of a judgment and the determination of the rights therein adjudicated fall within "administrative jurisdiction" or "administrative duty" or partake of any administrative aspect whatsoever. In subsequent sections of respondents' brief the purely judicial nature of these questions is recognized. Thus, the brief of respondents states on page 2 that: "Each of these cases involved the right and power, under the Illinois statutes, of an Illinois municipality to control and license the entry upon and occupation of streets * * * by an electric public utility * * * the franchise or license granted by the municipality having expired * * *."

It is obvious that there is a fundamental difference in the nature of the jurisdiction requisite to a determination of whether a municipality has the "right and power" to oust a utility and the nature of jurisdiction requisite to a determination of whether, on grounds of public convenience and necessity, the utility should discontinue service in a municipality. Because petitioners joined issue with respondents on the question of public convenience and necessity does not mean, as claimed in the brief of respondents (pp. 7-10, 18), that petitioners by their answers filed with the Commission joined issue on and invited determination by the Commission as to whether the "right and power" existed in respondents to oust petitioners. The question of the "right and power" of respondents to oust petitioners was not, and could not have been, an issue before the Commission. Petitioners neither by their answers filed with the Commission nor otherwise invited the Commission to decide, or submitted to the Commission for consideration, the question of the "right and power" of respondents to oust petitioners. Nor did petitioners call upon the Commission to determine what matters were adjudicated in their ouster suits or the extent to which those adjudications were *res judicata.*

Denial that the Commission has jurisdiction to decide purely judicial questions cannot invoke exercise of jurisdiction which is denied to exist. Denial of the existence of jurisdiction in the Commission to determine these legal issues is not only a denial of power in the Commission to either say "Yes" or "No" to the question of the existence in respondents of the "right and power" to oust petitioners, but is also a denial of the jurisdiction to entertain that question.

The brief of respondents states on page 13 that petitioners have taken the position that by virtue of the decision in the first Geneseo case they have "acquired vested rights to continue to occupy the streets of Geneseo and

Heyworth respectively; * * *." The brief of respondents further states on page 15 that "The Commission by basing its decision on the question of public convenience, necessarily held adversely to the petitioners on their claim of vested rights." Both of these statements misconstrue the position taken by petitioners in their answers filed with the Commission. Petitioners did not claim before the Commission that they had a vested right "to remain undisturbed" in the municipalities. What petitioners claimed before the Commission was that they had the right to have the Commission determine on the criterion of public convenience and necessity whether their services in respondent municipalities should be discontinued and that if petitioners were ordered to discontinue their services otherwise than on the grounds of public convenience and necessity petitioners would be deprived of their property without due process of law (R. 12, 86).

The statement on page 23 of respondents' brief that "Both sides came before the Commission proclaiming that the question involved was the ouster of the utility under the admitted facts in each case," is not correct. Neither side proclaimed that such a question was involved. Any suggestion or claim on the part of respondents to the "right and power" of ouster existing in respondents was explicitly negatived by respondents themselves in the following paragraph contained in each of their complaints before the Commission:

> "14. That the Supreme Court of Illinois decided in the case of *City of Geneseo* v. *Illinois Northern Utilities Company*, 363 Ill. 89, that the power to compel a utility whose franchise expired, to vacate the public streets of a municipality, has been withdrawn from such municipality and has been vested in the Illinois Commerce Commission." (R. 4, 75.)

Respondents did not make the question of the existence in them of power of ouster an issue in the proceedings before

the Commission by affirmatively asserting in each of their complaints that such power had been withdrawn from them and had been vested in the Commission.

The records before the Commission admit of no doubt that the sole issue entertained and decided by that body was whether, on the criterion of public convenience and necessity, the petitioners should be required to discontinue their electric service in and to remove their electric facilities from the respondent municipalities.

The decision of the Supreme Court of Illinois in the instant case speaks for itself. It definitely shows that the court disregarded the action of the Commission as regards public convenience and necessity and instead determined three legal issues: (1) that the Cities and Village Act granted power to Geneseo and Heyworth to oust Northern and Central, (2) that the Public Utilities Act did not repeal that grant, and (3) that the former Geneseo case did not adjudicate that Geneseo and Heyworth lacked power to oust Northern and Central.

The brief of respondents does not dispute the statements and supporting authorities in petitioners' brief (pages 20, 21) that up to the date of the present decision of the Supreme Court of Illinois the provisions of the Public Utilities Act had been repeatedly construed to contain no grant of power to the Commission to entertain or determine a judicial question; that up to the date of the present decision of the Supreme Court of Illinois that court had held that the interpretation of statutes to determine the existence and extent of powers granted and whether a later act of the legislature repealed an earlier one, were judicial functions susceptible of performance only by the exercise of judicial power. Under such state of the law, as declared by the Supreme Court of Illinois itself, there existed no jurisdiction in the Commission at the time the present complaints were pending before it to entertain or deter-

mine these judicial questions, and no default may be charged against petitioners for failing to plead and prove the defense of *res judicata* or such other defenses as petitioner might have presented had the proceedings been in a court of law or equity. The primary due process requirements of competent jurisdiction and an opportunity to present defenses were not available when the proceedings were pending before the Commission.

The brief of respondents does not explain to this Court wherein the Commission has jurisdiction to examine the judgments and determine the rights adjudicated by such judgments, or wherein the Commission has jurisdiction to construe the statutes and determine the powers granted or repealed by such statutes, nor does the brief of respondents explain to this Court wherein the Supreme Court of Illinois in reviewing an order of the Commission on the basis of the record before the Commission acquired jurisdiction to determine any of these legal questions.

Such defenses as petitioners had to these three above mentioned legal issues, whether meritorious or not, petitioners were entitled to present to a tribunal of competent jurisdiction. Since the opportunity was wanting of presenting these defenses to the Commission and since, in reviewing an order of the Commission, the Supreme Court of Illinois is confined to the record made before the Commission, petitioners have had no opportunity of presenting their defenses.

On page 10 of the brief of respondents it is stated that "The validity and construction of orders of state administrative bodies, and the extent to which prior decisions of state courts are to be *res judicata* in subsequent litigation, are matters of local law, on which the decisions of the highest state court are controlling." Petitioners do not deny the soundness of that statement provided the requirements of jurisdiction and an opportunity to present

defenses have been met. The above statement from respondents' brief simply begs the question. Petitioners attack the decision of the Supreme Court of Illinois because the court reached beyond the scope of its jurisdiction and the scope of the record before it and decided issues outside of the record and concerning which petitioners had had no opportunity to present their defenses.

At the earliest opportunity available to them petitioners specifically set up and claimed before the Supreme Court of Illinois that it had acted beyond its jurisdiction and without affording petitioners a hearing in violation of the due process clause of the Fourteenth Amendment. The Supreme Court of Illinois adhered to its decision and in so doing decided the federal due process questions against petitioners.

On page 21 of respondents' brief it is stated that "There is nothing whatever in or outside of this record to justify the attempted implication that these petitioners, or anyone else in like situation, ever have sustained any legal detriment whatever in reliance on the first Geneseo case or the 1936 circuit court decisions." Petitioners admit that the record contains no such showing but petitioners assert that had the opportunity been given to them, as for example had respondents instituted second ouster suits before the circuit courts of Illinois, petitioners in support of the court's consideration of the principle of *stare decisis* could and would have presented evidence establishing that serious detriment would result to petitioners on account of expenditures made by them and obligations incurred by them in reliance on the first Geneseo case. That evidence was not presented to the Commission because it would not have been relevant to the issue before the Commission.

The brief of respondents states on page 15: "The Su-

preme Court adopted a different standard from that set up by the Commission. The latter body had held that unless public convenience *demanded the ouster* of a utility, upon the expiration of its franchise, it *could not* be ousted. The Court held that unless public convenience *demanded the retention* of the utility, it *must* be ousted when its local franchise expired." This is an incorrect statement both of what the Commission held and of what the Supreme Court held. The Commission held that its determination of whether utilities should discontinue operations "should be made in accordance with the just and reasonable requirements of public convenience and necessity, that is, whether or not the respondent public utility now serves a useful purpose in the City of Geneseo as contemplated by the Public Utilities Act" (R. 50-51). The Supreme Court held that Geneseo and Heyworth had the absolute power to oust Northern and Central. That is one of the questions which petitioners claim the court was without jurisdiction to decide and concerning which they have had no opportunity to present their defenses.

If the contentions of respondents be sound (see page 11 of their brief) that certain sections of the Illinois Public Utilities Act conferred upon the Commission jurisdiction to determine (1) the legal power of Geneseo and Heyworth to oust petitioners, (2) whether or not such power had been repealed by the Public Utilities Act, and (3) what rights had been adjudicated in the former ouster suits, then with respect to such matters the Commission would have concurrent jurisdiction with the circuit courts of Illinois.

The following illustration will show the unsoundness of such a view. Suppose a plaintiff property owner brings an ejectment suit against a defendant electric utility to compel the removal of an electric line from property which

plaintiff claims to own and over which the defendant utility claims to hold an easement from plaintiff's grantor. A judgment in the ejectment suit is rendered by the court against the plaintiff. Plaintiff then files a complaint with the Commission praying that the utility be ejected. The Commission, if respondents' contentions are valid, would have jurisdiction to determine (1) whether or not plaintiff had title to the property, (2) whether or not the easement from plaintiff's grantor was valid, and (3) whether or not the judgment in the prior ejectment suit was a bar to the complaint. If the Commission held in such case, as it would have been compelled to do under the then prevailing decisions of the Supreme Court of Illinois, that it had no power to entertain the complaint, then the complaining property owner could, under the views advanced by respondents, carry an appeal from the orders of the Commission up to the Supreme Court of Illinois and that court could, notwithstanding the restraints of due process, determine that the complaining property owner had title, that the easement was invalid, and that the judgment in the prior ejectment suit did not bar complainant from again litigating the issue. The illustration is analogous to the situation in the present case. Clearly the contentions of respondents in this regard must fall of their own weight.

In the foregoing reply, petitioners have not undertaken to answer in detail, nor to untangle, the somewhat confused arguments set forth in respondents' brief. The petition for certiorari, petitioners believe, states in simple and straight-forward manner the points in issue and the grounds for review. Petitioners submit that respond-

ents have failed squarely to meet or answer those issues and grounds.

Respectfully submitted,

DAVID F. TABER,
of Chicago, Illinois,
Attorney for Illinois Northern Utilities Company, Petitioner.

CLAUDE A. ROTH,
of Chicago, Illinois,
Attorney for Central Illinois Electric and Gas Company, Petitioner.

ISHAM, LINCOLN & BEALE,
Chicago, Illinois,

WILSON & MCILVAINE,
Chicago, Illinois,

DIXON, DEVINE, BRACKEN & DIXON,
Dixon, Illinois,

HENRY WATERMAN,
Geneseo, Illinois,

GOTTLIEB & SCHWARTZ,
Chicago, Illinois,
Of Counsel.

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